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No. 97-1578

In The
Supreme Court of the United States
October Term, 1997

HOECHST CELANESE CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICI CURIAE* OF DEFENDERS OF PROPERTY RIGHTS* IN SUPPORT OF THE PETITIONER

Nancie G. Marzulla
DEFENDERS OF
PROPERTY RIGHTS
1350 Connecticut Ave., N.W.
Suite 410
Washington, D.C. 20036
(202) 822-6770

April 22, 1998

* *Amici* listing continued on next page

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BRIEF *AMICI CURIAE* OF

DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION
EAST TEXAS HERITAGE ASSOCIATION
FRONTIERS OF FREEDOM INSTITUTE
HILL COUNTRY HERITAGE ASSOCIATION
LAND RIGHTS FOUNDATION
MAINE CONSERVATION RIGHTS INSTITUTE
PEOPLE FOR THE WEST! ACCORD CHAPTER
STOP TAKING OUR PROPERTY
TEXAS JUSTICE FOUNDATION
TRANS TEXAS HERITAGE ASSOCIATION

TIMBER PRODUCERS ASSOCIATION OF MICHIGAN AND WISCONSIN

QUESTIONS PRESENTED

1) Whether the *Chevron* Doctrine requires a court to defer to the agency where the agency invokes the power of the court to impose penalties?

2) Whether the imposition of penalties for the violation of a regulation whether there has been "fair notice" and for which there has not been a reasonable time to comply violates the Due Process Clause?

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Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioner.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgment of private property rights in the Davis Mountains and Trans-Pecos areas.

East Texas Heritage Association (Pecan Gap, TX) has actively challenged the erosion of private property rights.

Frontiers of Freedom Institute (Arlington, VA) seeks through its research and educational activities to defend the constitutional rights of all Americans and to restore constitutional limits on federal, state, and local governments.

Hill Country Heritage Association (London, TX) was formed in response to the proposed dedication of twelve Texas counties as habitat for an endangered species.

Land Rights Foundation (Gloversville, NY) is dedicated to private property rights and private conservation, through education and research.

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[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* (their members or counsel) contributed financially to the preparation of this brief.

Maine Conservation Rights Institute (Lubec, ME) is a research and educational institute serving the land-owning public of Maine.

People for the West! ACCORD Chapter (Scottsdale, AZ) is a grassroots organization created to support western communities against the overreaching hand of government.

STOP Taking Our Property (Chesterton, IN) is comprised of 300 farm families who live along the Salt Creek and Little Calumet Rivers in Porter County, Indiana.

Texas Justice Foundation (San Antonio, TX) seeks to protect, through litigation and education, those fundamental freedoms and rights essential to the preservation of American society. To reinvigorate public education, strengthen the family, and promote the private sector business climate we must limit government to its traditional and appropriately limited role.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowner rights. Its members collectively own over fifteen million acres of land in Texas and other states.

STATEMENT OF THE CASE

Petitioner, Hoechst Celanese Corporation ("HCC"), is a chemical manufacturing company and in 1984 had four plants that used benzene as part of their manufacturing process. Beginning in 1992, respondent United States filed three, virtually identical, enforcement actions against HCC seeking millions of dollars in penalties, for an alleged violation of an EPA regulation that petitioner had essentially complied with by the time the lawsuits were filed. *United States v. Celanese Eng'g Resins, Inc.*, No. H95-0619 (S.D.

Tex. filed March 2, 1995)("the Bishop case"); *United States v. Hoechst Celanese Corp.*, No. 93-0864-R (W.D. Va. filed November 17, 1993)("the Celco case"); and, the instant case, *United States v. Hoechst Celanese Corp.*, No. 0-92-1879-17 (D.S.C. filed July 1, 1992)("the Celriver case").

Each of these lawsuits alleges the same violation of a Clean Air Act regulation promulgated by the Environmental Protection Agency ("EPA") on June 6, 1984, as part of benzene emission standards (National Emission Standard for Equipment Leaks of Benzene)("benzene regulations"). The regulations expressly exempt any equipment in a plant that used up to 1,000 megagrams (1,000 metric tons) of benzene per year:

> Any equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of benzene per year is exempt from the requirements of [this regulation].

40 C.F.R. § 61.110 (c)(2)(1997).

There is no question that in this case petitioner reasonably believed that the exemption applied to its Celriver plant operations (as well as the use of benzene at the other two plants). App. 41a-42a. Both the preamble to the rule and other documents used in the rulemaking interpret the exemption to apply to the amount of benzene "consumed" or the amount of benzene "in inventory" at a plant site. App. 50a-51a; 62a. By either measure petitioner's Celriver plant was exempt, since it annually consumed and had in inventory a combined total of far less than 1,000 megagrams of benzene. App. 42a. In addition, between 1984 until 1989, state and federal regulators told petitioner, both orally and in writing, that its use of benzene in the Bishop plant in Texas

was exempt. *Id.* For example, in 1984, Texas regulators – following consultation with EPA Region VI – formally confirmed that the Bishop Plant was exempt from the benzene regulations. Petitioner reasonably relied on this confirmation. A copy of the letter confirming the exemption was sent to EPA Region VI by the then-Texas Air Control Board. App. 56a. Petitioner's use of benzene was exactly the same in the Celriver plant, which is the subject of this lawsuit, as it was in the Bishop plant. App. 42a, 62a, 65a.

Nevertheless, in 1990, respondent informed petitioner that its earlier interpretation of the regulation was not the proper interpretation of the rule, and that the agency in some unpublished, internal documents had defined the term "use" to mean "multiple counting." App. 30a-33a. Upon notification of respondent's shift in policy, petitioner immediately provided respondent with a compliance plan, consistent with the terms of respondent's compliance rules which allowed a company two years to comply. App. 78a-79a; 83a. By September 1991, petitioner was fully in compliance with respondent's new interpretation of its rule. Pet. 6.

Despite the lack of any environmental benefit to be achieved by an enforcement action and despite the fact that petitioner at all times has made a good faith effort to comply with the rule, on July 1, 1992, respondent filed the instant enforcement action against HCC. On May 10, 1996, Judge Anderson for the district court of South Carolina found that respondent's current interpretation of the regulation, which was neither published nor communicated to the state of Texas which had the delegated authority to enforce the Clean Air Act, did not provide petitioner fair notice. App. 72a. The district court further concluded that the government's interpretation of the benzene exemption did not comply with constitutionally based principles of due process. App. 71a. Accordingly, the district court held that petitioner could not

be found liable or penalized for having violating the rule when it was published, and that petitioner had "acted responsibly to meet -- and far exceed -- the terms of the [benzene regulation]" within the regulatory time for compliance. App. 69a-70a.

The district court specifically and strongly renounced the practice of agency staff changing regulatory meaning through unpublished internal guidance documents. The court below stated that agencies must *publish* clarifying guidance in order to ensure that they clearly communicate to the regulated community the meaning of a regulation as it will be enforced:

> During the past 12 years, the government has provided several different, inconsistent articulations and applications of [the regulation] . . . . Awarding penalties where the problem is the language chosen by the agency, rather than any unwillingness to comply would only "delay the day when . . . regulations will be written in clear and concise language" so that regulated parties "will better be able to understand and observe them."

App. 58a n.12, 60a.

On appeal, the Fourth Circuit held that it was required by this Court's seminal decision in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to defer to EPA's present interpretation of the rule so long as EPA's interpretation was not "nonsensical." App. 8a. However, the court below held that petitioner had not received fair notice of respondent's interpretation of the rule and as a result held that petitioner could not be penalized for failure to comply with the benzene

regulations from 1984 until 1989. But, the court below held that petitioner could be held liable 90 days following actual notice of the new regulatory interpretation, even if compliance within such a short time frame would have been impossible. App. 8a.

SUMMARY OF ARGUMENT

In 1994 Justice Thomas, in dissent, joined by three other justices, issued a strong criticism of agency rulemaking that could have been written with the instant case in mind:

> It is perfectly understandable, of course, for an agency to issue vague regulations because to do so maximized agency power and allows the agency greater latitude to make laws through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties might have adequate notice concerning the agency's understanding of the law. ... An agency whose powers are not limited either through meaningful statutory standards or . . . rules poses a serious potential threat to liberty and democracy.

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994).[2]

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[2] Moreover, EPA's tendency to promulgate ambiguous regulations, rather than give them specificity through the formal rulemaking process, stands on its head the rule-making process established by the Administrative Procedure Act, 5 U.S.C.§ 553. It deprives the public of a meaningful opportunity to comment, while evading congressional mandates of OMB review, analysis under the Paperwork Reduction Act, 44 U.S.C. § 3501 and Regulatory Flexibility Act, 5 U.S.C. § 601, avoids the necessity of

The failure of federal agencies to promulgate clear standards in regulations is a problem of increasing concern as reflected in a recent decision by the U.S. Court of Appeals for the D.C. Circuit in *Checkosky and Aldrich v. SEC*, No. 97-1137, 1998 U.S. App. LEXIS 6179 (D.C. Cir. Mar. 27, 1998). In *Checkosky*, the court gave a stinging criticism of the agency' ambiguous rulemaking to which severe penalties for violation were attached:

> It is simple impossible to know in advance what sorts of negligent errors will meet this "standard", we can imagine both narrow and potentially all-embracing constructions. There is no justification for the government depriving citizens of the opportunity to practice their profession without revealing the stand and they have been found to violate.

Id. at 4.

There would be seem to be little question that such agency rulemaking runs afoul of the Due Process Clause of the Fifth Amendment, *see, e.g., Kolendar v. Lawson,* 461 U.S. 352 (1983)(holding state penal statute void for vagueness on Due Process grounds); *Grayned v. City of*

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reporting significant rules to Congress under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C. and 15 U.S.C.), and relieves the EPA of compliance with various Executive Orders (*e.g.*, "Governmental Actions and Interference With Constitutionally Protected Property Rights", Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988)). It is clear from the administrative record in this case that EPA's 1989 interpretation would not have passed muster under many of these requirements, possibly explaining why the agency did not put forward its "multiple counting" interpretation until after the rule-making process had been concluded.

Rockford, 408 U.S. 104 (1972)("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined"); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)(holding vagrancy ordinance void for vagueness). As this Court explained in *Daniels v. Williams*, 474 U.S. 327, 331 (1986), the purpose of the Due Process Clause is to prevent government from abusing its power or employing it for purposes of oppression. Where severe penalties attach to agency interpreted regulations that begin the instant that notice is given, then clearly the Due Process Clause is implicated. The Due Process Clause, quite simply, forbids all deprivations of property by government action that is arbitrary, unreasonable or violative of fundamental principles of fairness. *Id.*

Thus, the issue of substantial constitutional importance in this case is not whether the agency had the power to interpret its regulations, but whether it was entitled to impose severe monetary penalties for failure to comply with an interpretation of which petitioner had not received "fair notice."

The other related question is whether an agency can legitimately pursue an enforcement action where it has failed to communicate clearly to the regulated community the standards contained in a regulatory program? When environmental laws and regulations are overly complex and ambiguous, it prevents the regulated community from understanding what conduct is permissible or prohibited. This case presents an opportunity for this Court to require agencies to promulgate regulations consistent with the requirements of the Due Process Clause and that further the legitimate purposes of environmental rules and regulations.

In addition, this case affords this Court the opportunity to revisit the *Chevron* doctrine and its application in the context of agency enforcement actions in

which the power of the court is invoked to "rubber stamp" agency decisions of penalty awards.

Without guidance from this Court with respect to these important constitutional issues on which the courts below are split, the door remains wide open for federal agencies to continue to promulgate and interpret regulations which the D.C. Circuit Court of Appeals recently described in one case as "almost deliberately obscurantist." *Checkosky and Aldrich*, 1998 U.S. App. LEXIS 6179, at *11 (D.C. Cir. March 27, 1998). Accordingly, *amici curiae* strongly urge this Court to grant petitioner a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. This case presents an excellent opportunity for this Court to resolve a split among the circuits as to whether the *Chevron* doctrine requires courts to defer to the agency where the agency invokes the power of the court to impose penalties.

It is a bedrock principle of our system of jurisprudence, premised on a separation of powers among the three branches of government, that courts are the final arbiters of what the law is:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who can apply the rule to particular cases, must of necessity expound and interpret that rule.

Marbury v. Madison, 5 U.S. 137, 1 Cranch 137 (1803). *See also* Article III, U.S. Const.

The notion that powers be split among the three branches of government reflects the framers' historical understanding that dates back to Montesquieu who argued that any combination of the judicial, legislative or executive powers would create a system with an inherent tendency towards tyrannical actions. Montesquieu, *The Spirit of the Laws*, 151-2 (Nugent trans. 1949).

That historical understanding of the importance of a governmental system of "checks and balances" upon which this country was founded is reflected in modern decisions of this Court. *See, e.g., Clinton v. Jones*, ___ U.S. ___, 117 S.Ct. 1636, 1649 (1997)("[We] have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law."), *City of Boerne v. Flores*, ___ U.S. ___, 117 S. Ct. 2157, 2162 (1997) ("judicial authority to determine the constitutionality laws" rests squarely on the judiciary branch as recognized in *Marbury v. Madison*.) Indeed, in 1994 Justice Thomas in dissent, joined by three other justices, explained the dangers of ignoring the separation of powers principle in agency decision making:

> It is perfectly understandable, of course, for an agency to issue vague regulations because to do so maximized agency power and allows the agency greater latitude to make laws through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties might have adequate notice concerning the agency's understanding of the law. . . . An agency whose powers are not limited either through meaningful statutory standards or . . . rules poses a

> serious potential threat to liberty and democracy.

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994).

Hence, this Court has carefully carved out an exception where the primacy of the judicial branch yields to agency decision making. Specifically, the court will defer to an agency rule validly interpreting a statute where Congress expressly grants the agency that authority. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)(holding that where a statute is ambiguous the judiciary must defer to a reasonable interpretation of the statute offered by the agency charged with administering the statute). More recently, the *Chevron* exception was extended in *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994), to allow judicial deference to an agency's interpretation of its own programmatic regulation where such authority has been granted by Congress. Although this Court has thus allowed the fusion of quasi-legislative rulemaking authority with quasi-judicial interpretative authority, it has never approved wholesale transfer of judicial power of executive branch agency in the guise of "deference."

The instant case takes the *Chevron* doctrine of deference beyond any decision of this Court and holds that not only is an executive branch agency entitled to make the law (via promulgation of a regulation) and to interpret the law that it has made, it is entitled to usurp the court's role in also assigning liability for the regulation. Hence, the court below has accomplished in one fell swoop the consolidation of power into the executive branch to make the law, interpret the law, and exercise the prerogative of the court to assign liability for violating the law: EPA promulgated the benzene regulations, EPA then interpreted the regulation at issue in this case, then assigned liability and penalties to HCC by convincing the court below that the dual doctrines of

deference and strict liability effectively eliminated any meaningful defense to EPA's claim.

> A court's review of regulations under Section 112 of the Clean Air Act, such as the Benzene Leaks NESHAP, is particularly limited because of the broad discretion congress gave EPA to control hazardous air pollutants. Under the Clean Air Act in effect when EPA promulgated the Benzene Leaks NESHAP, Congress delegated authority to EPA to identify hazardous air pollutants and their sources, to determine methods of controlling emissions from these sources, and to determine the level of control necessary to protect public health. Through its exercise of these powers, EPA has developed considerable scientific and policy expertise in the regulation of hazardous air pollutants. This court treads lightly when construing the scope of exemption that allows a source of hazardous air pollutants to go unregulated. The court will no substitute its own judgment on the scope of the exemption unless EPA's interpretation is plainly erroneous or inconsistent with the regulation.

App. 39a.

The decision of the Fourth Circuit in this case is also in sharp contrast to decisions of other circuit courts of appeals which have rejected such an expansive grant of deference when the power of the court is invoked to award penalties for violating an agency created and interpreted rule.

Justice Breyer writing for the Court of Appeals for the First Circuit flatly rejected EPA's argument that the Chevron doctrine required the court simply to grant EPA's requested injunctive relief without any independent judicial review in *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990), explaining:

> Precisely what, in the ordinary case, would be a court be expected to review? EPA's decision to ask the Attorney General to bring the action? The Attorney General's decision to file suit? Is the EPA supposed to win automatically as long as its decision to bring the action was reasonable?

Id. at 434.

Similarly, the Court of Appeals for the D.C. Circuit held in *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), cert. denied, 513 U.S. 1110, 115 S.Ct. 900 (1995). held that EPA could not promulgate binding regulations setting forth the circumstances under which a court of law would hold parties liable or not liable, stating that it could not "be argued that Congress intended EPA, one of many potential plaintiffs, to have authority to, by regulation, define liability for a class of potential defendants." *Kelley v. EPA*, 15 F.3d at 1107. Likewise, in *Redwing Carriers v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996), the Eleventh Circuit refused to defer to the EPA's determination of who was liable for a superfund site clean-up. The court distinguished an agency's legislative powers, which were entitled to deference, and its prosecutorial powers, which were not: "Although the EPA's view of who is liable for cleaning up the Saraland Site may support Redwing's case, neither the district court nor this court are obliged to defer to the agency's conclusions on this issue. Courts, not the EPA, are the adjudicators of the scope

of CERCLA liability." *Id.* at 1507 n.24. In *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996), the Ninth Circuit refused to defer the agency's interpretation of the Fair Housing Act in an enforcement action stating, "Justice dictates, however, that our general rule of deference to announcements of law by adjudication has its exceptions. . . ." *Id.* at 748.

Finally, in *Dico, Inc. v. Diamond,* 35 F.3d 348 (8th Cir. 1994), the court of appeals for the Eighth Circuit specifically rejected EPA's claim that it possessed the ultimate authority to resolve liability issues under CERCLA and that it decisions were thus entitled to *Chevron* deference. The court held that while EPA has most of the responsibility for administering CERCLA, EPA does not the ultimate authority to resolve issues of liability under the statute. Id. at 350. *Accord Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541-46 (1987)(stating that under Alaska National Interest Lands Conservation Act, district court has equitable discretion to determine what is in "public interest"); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319-20 (1982) (construing Federal Water Pollution Control Act as leaving courts their traditional equitable discretionary powers to balance competing claims); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946)(stating that in enforcement proceeding under Emergency Price Control Act district court has broad and flexible equitable powers unless statute clearly restricts court's equitable jurisdiction).

By stretching the *Chevron* doctrine to apply to instances where the power of the court is invoked to impose a penalty for violation of an agency created and interpreted rule, the court below has created a rule that requires courts to abdicate their responsibility as the ultimate arbiter of what the law is thereby destroying the balance of power intended by the framers of our Constitution. Hence, review by this court is necessary to review this decision and provide guidance to the lower courts which are currently split on

whether deference in cases where the agency is enforcing its own unpublished interpretation under a strict liability statute is warranted.

II. This case also raises an important constitutional issue that needs resolution by this Court – whether the imposition of penalties before it is possible to comply -- encourages agency entrapment of innocent violators contrary to the requirements of the Due Process Clause of the Fifth Amendment.

The fact that the courts below felt bound by the Chevron doctrine to "rubber stamp" the EPA's strict liability decision in this case also meant that the court below failed to test adequately the agency's decision to impose liability and asses monetary penalties under the Due Process Clause of the Fifth Amendment. The Due Process Clause of the Fifth Amendment demands that persons not be deprived of life, liberty or property without receiving fair notice. U.S. CONST. amend. V. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)(holding that the Due Process Clause of the Fourteenth Amendment requires that a deprivation of life, liberty, or property be preceded by fair notice). Although this Court has not set forth what constitutes "fair notice" in the context of regulatory enforcement actions, lower courts have largely agreed that agencies are required to give "fair notice" of these interpretations before civil sanctions may be imposed for violations based upon the interpretations. *See, e.g., General Electric Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)("In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.").

In the present case, the both the trial court and the Fourth Circuit held that HCC did not have fair notice until

August, 1989 of EPA's interpretation of the term "use" pursuant to the benzene NESHAP to include multiple counting of the same benzene quantity when recycled through plant equipment, rather than the total volume of benzene actually consumed by the plant. Pet. App 20a, 65a. The result of EPA's interpretation of the rule was to drastically increase the amount of benzene that HCC was required to report as "used", thus effectively eliminating the 1000 megagram exemption. The courts below, however, held that the lack of fair notice between 1984 and 1989 prevented HCC from being held liable for penalties during that period based on EPA's multiple counting interpretation.

The Fourth Circuit, however, held that HCC could be held liable for violating NESHAP standards a mere 90 days after HCC gained actual notice of EPA's interpretation in August 1989. Pet. App. 25a. This raises the question of whether a 90- day period between notice of prohibited conduct and ensuing penalties can be considered "fair" notice in satisfaction of the Due Process Clause.

This Court has held that 'fair' notice under the Due Process Clause must also be 'timely' notice. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court held that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, *so that he may act accordingly*." *Id.* at 108 (emphasis added).

Within the context of agency regulatory interpretation, the Court emphasized that agencies must provide the regulated public adequate time after notification of regulatory interpretations to bring their conduct into line with the interpretation. *Martin v. OSHRC*, 499 U.S. 144, 158 (1991)("[t]he decision to use a citation as the initial means

for announcing a particular interpretation may bear on the adequacy of notice to regulated parties . . .").

In the present case, the Fourth Circuit held that HCC was liable for noncompliance with the NESHAP regulation beginning 90 days after receiving actual notice of EPA's interpretation of what constituted "use" of benzene because the regulation itself provided for a 90-day period after the effective date of the rule for existing plants to come into compliance with the standard. Pet. App. 25a. The Fourth Circuit, however, completely fails to address the issue of how such a 90-day period could constitute 'timely' notice of the EPA interpretation sufficient to allow HCC to bring its plants into conformance with the interpretation. Indeed, it seems likely that the court below would have allowed for a shorter period between HCC's notification of the EPA interpretation and HCC's resulting liability for noncompliance had the NESHAP regulation so provided.

The 90-day compliance period in the benzene regulations, however, is tied to the effective date of the regulation, not from the date that the public was given notice of the regulation. 40 C.F.R § 61.05(c)(1997). In this case, the regulation was first proposed in 1981, three years before the final rule became effective. Pet. App. 85a. Accordingly, affected industries had at least three years notice of the EPA's proposed regulation of benzene. Indeed, the Administrative Procedure Act itself requires that the public be given notice of a proposed regulation before the regulation can become effective. 5 U.S.C. 553 (b). Therefore, it seems reasonable to believe that the 90-day provision was inserted into the benzene regulations with the understanding that the affected industries had already been on notice of the proposed regulation for three years with sufficient time to prepare their plants to comply with the regulation. It is wholly unrealistic that EPA expected factories to be entirely

overhauled to meet drastically different air pollution standards in only 90 days.

By holding Petitioner knowing that it would have been impossible to have complied with the most recent agency interpretation, the Fourth Circuit is essentially holding that penalties for prohibited conduct can be assessed simultaneously with notification of the prohibition. Providing untimely notice for the public to bring its conduct into compliance with the law is functionally the same as providing no notice whatsoever because either way the public is left with no option to avoid being penalized for noncompliance. This brings the Fourth Circuit squarely into conflict with the requirements of Due Process Clause set forth above. The practical effect of this case will be to tell agencies that they can play "hide the ball" with their regulatory interpretations, and successfully seek sanctions anytime they wish without even giving the regulated public an opportunity to come into compliance with the interpretations. Accordingly, there is a substantial constitutional issue raised in this case that needs resolution by this Court.

III. Finally, this case affords this Court an opportunity to provide guidance to federal agencies regarding when penalties can be legitimately imposed in order to achieve regulatory compliance consistent with the overall regulatory objective and when the imposition of such penalties constitutes nothing more than an abuse of regulatory power.

In *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996), the Ninth Circuit Court of Appeals struck down HUD's interpretation of the Fair Housing Act as "arbitrary and capricious" and in so doing, expressed the collective frustration of the regulated community regarding vague enforcement standards:

> We are most troubled that in this especially complex area of the law, in which private individuals may be subject to heavy-handed enforcement proceedings, the Secretary has done so little to enlighten the public as to what he expects of them. HUD should spare a thought for the law-abiding property owner, because the familial status amendment presents particularly difficult questions of compliance. . . . It is one of HUD's functions to develop expertise on the problem of housing discrimination. . . . and, on the basis of this expertise, to exercise its broad powers of enforcement and regulation. If HUD finds the line-drawing question difficult, imagine the position of Karl and Elizabeth Pfaff.

Id. at 749 (citations omitted).

In the area of environmental policy, the subject of the instant lawsuit, enforcement of and compliance with agency regulations is the chief means of achieving environmental policy. Yet, given the thousands of pages of environmental regulations on the books, there are abundant areas of complexity and confusion, and hence, plenty of opportunities for agencies to "catch" American businesses in violation of environmental regulations. There are, for example, approximately 1,000 pages of RCRA regulations, 4,000 pages of Clean Air Act regulations, 2,400 pages of Clean Water Act regulations. Richard Lazarus, "Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law," 83 Geo. L.J. 2536 (1995). Indeed, in a recent survey of the general counsels for major American corporations, seventy percent of the respondents stated that full compliance with all federal and state environmental laws was impossible, largely because

of complexity. Marianne Lavelle, "Environmental Vise: Law Compliance," 30 Nat'l L.J. S1 (1993).

The Ninth Circuit held in *Pfaff*, that this type of enforcement scheme did not serve a legitimate purpose and was arbitrary and capricious. *Pfaff*, 88 F.3d at 748. At a minimum, if environmental regulations are so complex or inconsistent that they cannot be easily understood or complied with, plainly fails to protect the environment because the regulated community cannot figure out what it must do – and therefore does not do it. This case well illustrates that regulations promulgated to protect the environment are effective only to the extent that their requirements are known and understood. Hence, this case affords this Court an opportunity to require federal agencies to communicate clearly its interpretations of federal regulations in order to enhance environmental compliance across the board.

CONCLUSION

Accordingly, for all the foregoing reasons, *amici curiae* strongly urge this Court to grant the requested Petition for Writ of Certiorari.

Respectfully submitted,

Nancie G. Marzulla
DEFENDERS OF
PROPERTY RIGHTS
1350 Connecticut Ave.,
N.W.
Suite 410
Washington, D.C. 20036
(202) 822-6770

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